Supreme Court, U. S.
FILED
JUL 27 1977
MICHAEL RODAK, JR., CLERK

No. 76-1658

In the Supreme Court of the United States

OCTOBER TERM, 1977

DYNAMIC MACHINE CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 552 F. 2d 1195. The decision and order of the National Labor Relations Board (Pet. App. 21a-32a) are reported at 221 NLRB 1140.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 1977. The petition for a writ of certiorari was filed on May 25, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly found that petitioner, a successor company that retained all of its predecessor's

employees and made no significant changes in operations, was required to bargain with the union selected in a recent Board election that was conducted prior to petitioner's purchase of the business.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth at pages 2-3 of the petition.

STATEMENT

Dynamic Machine Company ("Dynamic I") operated a manufacturing business performing machine shop functions and employing approximately 40 employees (Pet. App. 22a-23a). On March 20, 1974, pursuant to an election petition filed by District No. 8, International Association of Machinists & Aerospace Workers, AFL-CIO ("the Union"), the National Labor Relations Board conducted a representation election among Dynamic I's employees. Nineteen votes were cast for the Union and 14 votes against; six other ballots were challenged on the ground that they were cast by supervisors (Pet. App. 2a, 23a). On January 6, 1975, while Board proceedings to determine the validity of the challenges were pending, Dynamic I transferred ownership of the business to NJM Corporation, which operated it under the name of Dynamic Machine Company ("Dynamic II") (Pet. App. 22a).

Dynamic II retained all of Dynamic I's employees and continued Dynamic I's business without interruption at the same location and in the same plant. Dynamic II utilized essentially the same equipment and methods of production to manufacture the same type of product for primarily the same customers as Dynamic I (Pet. App. 26a). Dynamic II officials were aware of the pending Board proceedings at the time of the transfer of ownership (Pet. App. 3a).

On January 15, 1975, the Board sustained the Union's challenges to four of the six unopened ballots and certified the Union as the employees' representative (Pet. App. 3a-4a, 23a, 25a).[1] On January 31, the Union requested Dynamic II to bargain with it, and on February 7, Dynamic II refused the request (Pet. App. 24a). At the time of the refusal Dynamic II employed 33 employees, of whom 18 had voted in the Board election (Pet. App. 3a).

The Union filed unfair labor practice charges with the Board. Upon a stipulated record, the Board found that Dynamic II was a successor-employer under the standards established by this Court in *National Labor Relations Board* v. *Burns International Security Services, Inc.*, 406 U.S. 272, and that accordingly it violated Sections 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by refusing to bargain with the Union and by refusing to provide certain information requested by the Union relevant to collective bargaining (Pet. App. 26a-29a). The Board entered an appropriate remedial order (Pet. App. 31a-32a).

The court of appeals enforced the Board's order, upholding the Board's conclusion that, under the principles announced in *Burns*, Dynamic II was a successor-employer required to recognize and bargain with the union previously selected by its employees (Pet. App. 16a-20a).

ARGUMENT

1. In *National Labor Relations Board* v. *Burns International Security Services, Inc.*, 406 U.S. 272, the Court sustained the Board's conclusion that Burns, as the

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[1]The Board did not determine the validity of the remaining two unopened ballots because they could not have affected the outcome of the election (Pet. App. 25a).

successor to a contract held by Wackenhut Corporation to furnish guard services, was required to bargain with the union that had represented Wackenhut's employees. The Court noted (*id.* at 278) that "[i]n an election held but a few months before, the union had been designated bargaining agent for the employees in the unit and a majority of these employees had been hired by Burns for work in an identical unit." In these circumstances, the Court held (*ibid.*), "it was not unreasonable for the Board to conclude that the union certified to represent all employees in the unit still represented a majority of the employees and that Burns could not reasonably have entertained a good-faith doubt about that fact." The change of employers did not change the "employing industry," and, "[w]here an employer remains the same, a Board certification carries with it an almost conclusive presumption that the majority representative status of the union continues for a reasonable time, usually a year." *Id.* at 279 n. 3 (citing *Brooks* v. *National Labor Relations Board*, 348 U.S. 96, 98-99).

This case is like *Burns*. Dynamic I's employees selected the Union as their collective bargaining representative in a Board election. When Dynamic II purchased the business shortly before the Board certified the election results, Dynamic II retained all of Dynamic I's employees and made no changes in Dynamic I's methods of operation. Since the Union enjoyed an almost conclusive presumption of majority status before the ownership transfer and that transfer was not accompanied by any change in unit or employee complement that might have rebutted the presumption, the Board and the court below properly concluded that, under the principles established in *Burns*, Dynamic II was required to recognize the Union as the collective bargaining representative of its employees.

2. Contrary to petitioner's contention (Pet. 11-12), the Board and the court below did not ignore the

teaching of *Howard Johnson Co., Inc.* v. *Detroit Local Joint Executive Board*, 417 U.S. 249, in applying to this case the presumption of continued majority status during the first year of a certification. In *Howard Johnson* the Court held that a successor who hired less than a majority of the predecessor's employees was not bound by, and thus had no duty to arbitrate under, the predecessor's contract with the union. The Court stated that the answer to the inquiry into the legal obligation of the new employer to the employees of the former owner or their representative

> requires analysis of the interests of the new employer and the employees and of the policies of the labor laws in light of the facts of each case and the particular legal obligation which is at issue, whether it be the duty to recognize and bargain with the union, the duty to remedy unfair labor practices, the duty to arbitrate, etc. There is, and can be, no single definition of "successor" which is applicable in every legal context. A new employer, in other words, may be a successor for some purposes and not for others. [417 U.S. at 262-263 n. 9.]

The court below correctly concluded (Pet. App. 14a-15a) that this statement merely emphasizes that "the analysis that must be undertaken in one type of successorship case involving the duty to bargain, may differ substantially from the analysis undertaken in another type of successorship case, such as one involving a successor employer's duty to arbitrate disputes under a collective bargaining agreement entered by its predecessor." The statement does not suggest that the analysis that the Court approved in *Burns* is "no longer appropriate for deciding whether successor employers have a duty to bargain with [the representative of] their employees" (*id.* at 15a).

Beyond that, the court of appeals did not, as petitioner suggests (Pet. 12), engage in a "mechanistic application of the Board's certification year doctrine." Rather, it carefully considered the particular facts of this case in light of the principles enunciated in *Burns* and *Howard Johnson* (Pet. App. 9a-17a), and it correctly rejected petitioner's argument (Pet. 10, 18) that the close representation election, coupled with the turnover of approximately one-half of the voting employees in the unit between the election and the bargaining request, created sufficient doubt about the Union's continued majority to justify petitioner's refusal to bargain (Pet. App. 17a-18a):

> This very argument * * * was raised by the dissenting Justices in *Burns* and implicitly rejected by the majority's holding. In *Burns*, the successor employer was obligated to bargain with a union that had been selected in an election involving at most, 27 of the 42 employees retained by the successor employer [footnote omitted]. 406 U.S. at 275. Here, 18 of the 31 employees employed by Dynamic II when the union formally demanded recognition had voted in the election. The slightly greater percentage of employee turnover in the instant case is not significant enough to distinguish this case from *Burns*.

Finally, enforcement of a bargaining order is not precluded by the fact that three years have passed since the election was held (Pet. 18). Such a time lapse is the inevitable result of utilizing the procedures provided by the Act. To deny a bargaining order because of that circumstance "would put a premium on delay and procrastination by the company in complying with the Board's order." *National Labor Relations Board* v. *Copps Corp.*, 448 F. 2d 1227, 1231 (C.A. 7). See also

National Labor Relations Board v. *Gissell Packing Co.*, 395 U.S. 575, 610-611.[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1977.

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[2]There is no occasion for this Court to reexamine *Burns*, as petitioner requests (Pet. 20-22). *Burns* was decided only recently, after full consideration by the Court of the various competing considerations, and it has been cited with approval in subsequent decisions. See *Golden State Bottling Co.* v. *National Labor Relations Board*, 414 U.S. 168, 183-185; *Howard Johnson Co., Inc.* v. *Detroit Local Joint Executive Board, supra*, 417 U.S. at 254-262. See also *National Labor Relations Board* v. *Spitzer Akron, Inc.*, 540 F. 2d 841 (C.A. 6), certiorari denied, January 10, 1977, No. 76-560; *Zim's Foodliner, Inc.* v. *National Labor Relations Board*, 495 F. 2d 1131 (C.A. 7), certiorari denied, 419 U.S. 838.

DOJ-1977-07